IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL NO. 99-600**
	:	
v.	**:**	**CIVIL NO. 04-28**
	:	
MICHAEL BENJAMIN THORNTON	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **August 17, 2005**

Now before the Court is the Petition of Michael Benjamin Thornton ("Petitioner") for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 challenging the constitutionality of his conviction for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Petitioner alleges ineffectiveness of trial counsel as grounds for habeas relief. For the reasons that follow, the Petition will be granted.

I. Factual and Procedural Background

On September 23, 1999, a federal grand jury charged Petitioner by indictment with one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count 1). Trial commenced on June 5, 2000. The jury was unable to reach a verdict and the Court declared a mistrial on June 9, 2000. On February 13, 2001, retrial commenced and on February 15, 2001 the second jury found Petitioner guilty. On April 25, 2002, Petitioner was sentenced to 235 months in prison.

Petitioner appealed his conviction, and on May 7, 2003, the Third Circuit affirmed the judgment of conviction and commitment entered by this Court. See United States v. Thornton, 327 F.3d 268 (3d Cir. 2003). Petitioner filed the instant Petition for Writ of Habeas Corpus

pursuant to 28 U.S.C. § 2255 on January 5, 2004 and a Memorandum of Law in Support of the Petition on January 11, 2005. The government responded on July 11, 2005.

A. Exclusion of the Use of a Gun in the Camden Alleged Assault

The only real factual dispute before the jury at trial was whether Petitioner actually possessed a handgun on the evening of his arrest in Philadelphia.[1] At both trials the government's proof that Petitioner possessed the handgun was presented through the testimony of three police officers: Sergeant Jamill Taylor, Officer Curtis Younger and Officer Jacob Williams. During the first trial, the government and defense counsel agreed to exclude any mention of a handgun used by Petitioner during an alleged assault in Camden against Sgt. Taylor's brother. See Tr. 6/5/00 pp. 2-14. The Court ruled that, because Petitioner was charged with possession of a gun in the instant case, the "fact that he is charged with a shooting" in the Camden case involving Sgt. Taylor's brother "would unfairly prejudice him." Tr. 6/5/00 p. 14. The Court further noted that the Camden charge had not resulted in a conviction. Tr. 6/5/00 p. 14. Counsel for both sides agreed that the allegation underlying the Camden warrant would be referred to as an "aggravated assault" resulting in an injury to Sgt. Taylor's brother, and this Court instructed that the witnesses would "just not refer to a gun, [or] a shooting." Tr. 6/5/00 pp. 15-16. Accordingly, during both trials the witnesses testified only that Petitioner was wanted for aggravated assault and did not mention the handgun or the shooting.

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[1] Before trial, counsel stipulated that: (1) Petitioner had previously been convicted of a crime punishable by a term of imprisonment of more than one year; and (2) the gun had traveled in interstate commerce within the meaning of the felon in possession statute. Thornton, 327 F.3d at 270.

B. The Government's Evidence

In brief, the police officers testified as follows: All three police officers were in the area of 38th and Market Streets in Philadelphia as two clubs let out at around 2:00 a.m. Tr. 2/13/01 p. 57; Tr. 6/5/00 pp. 60-61. Sgt. Taylor knew Petitioner because they had both grown up in South Philadelphia. Tr. 2/13/01 p. 9. He also knew that Petitioner was wanted in Camden for allegedly assaulting his brother. Tr. 2/13/01 pp. 10-11. Upon seeing Petitioner in the area of 38th and Market Streets, Sgt. Taylor informed the other two police officers about the warrant for the assault and directed them to arrest him. Tr. 2/13/01 p. 11. As Officer Williams approached Petitioner, he yelled for him to stop and Petitioner began running towards 38th Street with Officers Younger and Williams chasing him on foot. Tr. 2/13/01 p. 12. Sgt. Taylor drove his police car down Market Street and partially turned onto 38th Street, blocking Petitioner's path. Tr. 2/13/01 p. 12. Petitioner ran into the car, then turned and ran behind it, at which point Officer Younger hit Petitioner, knocking him to the ground. Tr. 2/13/01 pp. 12-13. The officers testified that a black handgun then fell from Petitioner's waistband to the ground and he was arrested. Tr. 2/13/01 pp. 13-14, 63. None of the officers saw the outline of the gun in Petitioner's clothing prior to it falling from his waist when Officer Younger struck him. Trial Tr. 2/12/01 p. 88; Tr. 2/13/01 pp. 14, 64.

C. Defense Evidence

The defense in both trials presented two witnesses from that night, Marissa Blaylock and Sareeta Clayton. Both witnesses described the security precautions at the club Petitioner had just exited, which involved patting down all who entered and the scanning of men with a metal detector. Tr. 2/13/01 pp. 86-87, 109. Both witnesses saw Petitioner inside the club, and Ms.

Blaylock described Petitioner's attire as a T-shirt and a pair of shorts. Tr. 2/13/01 pp. 88, 110. Ms. Blaylock also testified that she hugged Petitioner outside the club at the end of the evening and that she did not feel any gun in his waistband. Tr. 2/13/01 p. 89. Soon after saying goodbye to Petitioner, both women saw the police chasing him down Market Street towards 38th Street, and saw an officer tackle him. Tr. 2/13/01 pp. 91-92, 111-12. Neither witness saw a gun fall from Petitioner's waistband, nor did either of them see the officers pick up a gun or anything else from the street. Tr. 2/13/01 pp. 91-92, 112-13.

D. The Introduction at the Second Trial of the Evidence Ruled Inadmissible

At the second trial, defense counsel, who was new to the case, introduced into evidence an unredacted police report which stated that Petitioner was wanted in New Jersey for an incident involving a handgun and shooting. See Memorandum of Law in Support of Petition ("Petitioner's Memorandum") at Exhibit A. This unredacted version specifically stated that Petitioner was wanted on a warrant in Camden County "on aggravated assault with a gun for shooting Sgt. Taylor's brother," and that the gun was a "handgun." Trial Ex. D-4; Petitioner's Memorandum at Exhibit A.[2]

Defense counsel explains that he had prepared a redacted version of the police report, but introduced the unredacted version instead by mistake. See Aff. of Michael Dougherty, Esq., attached to Petitioner's Memorandum at Exhibit B. During deliberations, the jury requested a copy of the report. Both parties agreed that since the report was in evidence the jury could see it, and the Court allowed a copy to go to the jury. See Tr. 2/15/01 p. 3. The unredacted version

[2] Petitioner was never prosecuted on this Camden assault charge. Petitioner's Memorandum at p. 15.

included the following:

> While on location Sgt. Taylor observed a B/M he knew as "Mike" wearing a black t-shirt and blue jean shorts and who was wanted on a warrant in Camden County, NJ on an agg. assault with a gun for shooting Sgt. Taylor's brother ... P/O Williams ... and P/O Younger ... state while on patrol ... they were informed by Sgt. Taylor [] that the defendant, later identified as Michael Thornton 28/B/M, was wanted on a warrant for an agg. assault by handgun.

Trial Exhibit D-4; Petitioner's Memorandum at Exhibit A.

During deliberations, the jury asked whether they could consider information from the (unredacted) police investigation report that was not discussed during the trial. Defense counsel agreed that since the (unredacted) police report was in evidence, the jury could consider the entire document. Tr. 2/15/01 p. 3. Defense counsel did not seek to have the jury instructed not to consider the statements in the police investigation report regarding the Camden shooting. It was not until after the jury returned a guilty verdict and after he spoke to an individual juror that defense counsel realized that he had introduced the unredacted version of the police report which contained the prejudicial material regarding Petitioner's alleged prior shooting of Sgt. Taylor's brother. Aff. of Michael Dougherty, Esq., attached to Petitioner's Memorandum at Exhibit B.

II. Analysis

To establish ineffective assistance of counsel, Petitioner must show: (1) that counsel's conduct was deficient - that it was "outside the wide range of professionally competent assistance;" and (2) that the deficiency resulted in prejudice to the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 690, 694 (1984). In the

present case, both prongs of the Strickland test are met.

A. Counsel's performance was deficient

Through inadvertence and mistake, defense counsel in the second trial, who had replaced defense counsel from the first trial, offered into evidence the unredacted version of a police report which contained evidence that this Court had ruled inadmissible precisely because it would "unfairly prejudice" the defense. Tr. 6/5/00 p. 14. New counsel knew the unredacted police report was unfairly prejudicial to his client, but introduced it inadvertently and failed to catch this mistake even in the face of jury questions regarding the report.[3]

The government has conceded that defense counsel's performance in this case was deficient. United States v. Thornton, 327 F.3d 268, 271 (3d Cir. 2003) (noting the government's concession that counsel's performance was deficient); see also Government's Response to Petitioner's Motion to Vacate ("Government's Response") at p. 3 ("... the government concedes that the police report about which [Petitioner] complains contained information that should have been redacted ..."). This Court agrees. Thus, the only issue remaining is whether this admittedly deficient performance prejudiced Petitioner's defense.

B. There is a reasonable probability that, but for new counsel's deficient performance, the result of the proceeding would have been different

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[3] Courts have found no strategic value in counsel's failure to object to the admission of prejudicial evidence, and accordingly, have found such failure to constitute ineffectiveness. See Lyons v. McCotter, 770 F.2d 529, 534 (5 th Cir. 1985) (holding that counsel was ineffective for failing to object to cross-examination testimony revealing that defendant had previously been convicted of the same charge for which he was on trial, that the evidence was prejudicial and clearly inadmissible and that such a failure to object had no strategic value); Atkins v. Alabama, 932 F.2d 1430, 1432 (11 th Cir. 1991) (finding counsel's performance deficient in failing to object to the admission of defendant's fingerprint card which clearly noted a prior arrest, because counsel should have realized that this would have prejudiced the defense).

As the Third Circuit has recognized, Strickland's prejudice standard "is not a stringent one." Hull v. Kyler, 190 F.3d 88, 110 (3d Cir. 1999) (quoting Baker v. Barbo, 177 F.3d 149, 154 (3d Cir. 1999)). Indeed, "[i]t is less demanding than the preponderance standard." Hull, 190 F.3d at 110. In order to demonstrate that Petitioner was prejudiced by his counsel's deficient performance, he need not demonstrate that the outcome definitely would have been different. See id. Petitioner must show only that there is a reasonable probability that he would not have been convicted had the error not occurred. See Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (stating the Strickland test's prejudice prong focuses on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair); see also Hull, 190 F.3d at 110 (defining a reasonable probability as a probability sufficient to undermine confidence in the outcome).

In arguing that counsel's deficient performance in failing to object to the admission of the police report in unredacted form was prejudicial to his defense, Petitioner specifically notes that the court had excluded this evidence at the first trial because it would "unfairly prejudice" him. The government responds that Petitioner was not unduly prejudiced by the admission of the unredacted police report because of the other "overwhelming evidence" which established his guilt. Government's Response at 3.

This case was ultimately a credibility contest between the police witnesses and the defense witnesses and the only factual issue left for the jury to resolve was whether Petitioner possessed a handgun on the night that he was arrested in Philadelphia. The government's evidence consisted of three police officers who testified that they saw, at close range, the handgun drop from Petitioner's waistband as they sought to arrest him on an open arrest warrant

from Camden. Two defense witnesses testified that they did not see a gun drop from Petitioner's waistband and that they saw him inside the club where he would have had to pass through a metal detector to gain entry. In addition, just before the arrest both defense witnesses walked by Petitioner outside the club, and one gave him a hug around the waist. Although Petitioner was wearing only shorts and a t-shirt, the witness did not feel a gun or any other object in his waistband.

As the Third Circuit noted, the only information in the report that was not discussed at either trial was that Petitioner was wanted on a warrant "on an agg. assault with a gun for shooting Sgt. Taylor's brother," that the alleged assault was "by handgun," and that he did not have a valid permit to carry the gun obtained on the night at issue. See Thornton, 327 F.2d at 271; Petitioner's Memorandum at Exhibit A. The first trial ended with the jury unable to reach a verdict. Because the only new evidence at the second trial was the extremely prejudicial propensity evidence that Petitioner was wanted in Camden for using a handgun in a shooting, there is a reasonable probability that the jury's verdict would have been different but for defense counsel's deficiency. See United States v. Stevens, 935 F.2d 1380, 1401-06 (3d Cir. 1991) (ruling that it could not conclude that the government's evidence was "overwhelming" in view of the fact that the first jury to hear the case deadlocked and noting "we think it possible that the admission of evidence about the [other similar] robbery might have swayed the jury toward an acquittal"); Atkins, 932 F.2d at 1432 (11th Cir. 1991) (granting a habeas motion where defense counsel's failure to object to the introduction of evidence of a prior arrest through a fingerprint card so prejudiced the defendant as to affect the outcome of the trial and a review of the record confirmed that evidence of the defendant's guilt was not overwhelming).

Accordingly, defense counsel's placing before the jury inadmissible evidence that Petitioner was wanted in Camden for shooting someone with a handgun meets the prejudice prong of Strickland because this evidence plainly suggested that Petitioner had a propensity to carry a handgun. See United States v. Morley, 199 F.3d 129, 134 (3d Cir. 1999) (noting that the "very evil that Rule 404(b) [of the Federal Rules of Evidence] seeks to prevent" is the inference that defendant is probably guilty merely because he "previously engaged in 'similar' impropriety"). The only significant difference between the first trial, which ended in a hung jury, and the second trial was that the second jury saw this evidence. Defense counsel's ineffectiveness in presenting the unredacted document to the jury was clearly prejudicial. Petitioner was thus deprived of his Sixth Amendment right to effective assistance of counsel, and his conviction will be reversed and a new trial ordered.

III. Conclusion

For the foregoing reasons, Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 will be granted. An appropriate order follows.

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MICHAEL BENJAMIN THORNTON	**:**	

ORDER

AND NOW, this 17th day of August, 2005, upon consideration of Petitioner's Writ pursuant to 28 U.S.C. § 2255 (case no. 99-cr-600, docket no. 79), the Memorandum of Law in Support thereof (docket no. 81), the Government's response thereto (docket no. 88), and the oral arguments made during the hearing held on this matter on August 16, 2005, it is **ORDERED** that:

(1) The petition for writ of habeas corpus is **GRANTED** and Petitioner's conviction and the Court's Judgment and Commitment Order are **VACATED** and **SET-ASIDE**.

(2) The execution of the writ of habeas corpus is **STAYED** for 90 days from the date of this Order, during which period the United States may commence a new trial. If the United States does not commence a new trial within 90 days from the date of this Order, Petitioner shall be released from custody.

(3) Pursuant to 28 U.S.C. § 2253, a certificate of appealability shall issue.

BY THE COURT:

s/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.